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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 UNITED STATES OF AMERICA,

8 Plaintiff,

Case No. 2:03-cr-0158-KJD-PAL  
2:17-cv-0740-KJD

9 v.

ORDER

10 VU NGUYEN,

11 Defendant.

12 Presently before the Court is Petitioner Vu Nguyen's Motion to Vacate, Set Aside, or  
13 Correct Sentence under 28 U.S.C. § 2255 (#244/257). The Government filed responses in  
14 opposition and supplements (#246/252/258) to which Petitioner replied (#248/253/259).

15 I. Background

16 Nguyen was found guilty after a jury trial to a three crimes: (1) Count One -- Conspiracy  
17 to interfere with commerce; (2) Count Two -- Interference with commerce by robbery (Hobbs  
18 Act Robbery); and (3) Count Three -- carrying and use of a firearm during and in relation to a  
19 crime of violence under 18 U.S.C. § 924(c), specifically the interference with commerce by  
20 robbery charged in Count Two of the superceding indictment. This Court sentenced Nguyen to  
21 sixty (60) months imprisonment on Count One; sixty-three (63) months on Count 2; and two  
22 hundred and ninety-three (293) months of imprisonment on Count 3, to be served consecutively  
23 to Counts One and Two, followed by five years of supervised release. In the instant motion,  
24 Nguyen moves to vacate his § 924(c) conviction and sentence pursuant to Johnson v. United  
25 States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319, 2336 (2019) , and  
26 requests that the court vacate his conviction.

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1 II. Analysis

2 A federal prisoner may move to “vacate, set aside or correct” his sentence if it “was  
3 imposed in violation of the Constitution.” 28 U.S.C. § 2255(a). When a petitioner seeks relief  
4 pursuant to a right recognized by a United States Supreme Court decision, a one-year statute of  
5 limitations for seeking habeas relief runs from “the date on which the right asserted was initially  
6 recognized by the Supreme Court.” 28 U.S.C. § 2255(f)(3). The petitioner bears the burden of  
7 demonstrating that his petition is timely and that he is entitled to relief.

8 In Johnson, the United States Supreme Court held that the residual clause in the  
9 definition of a “violent felony” in the Armed Career Criminal Act of 1984, 18 U.S.C. §  
10 924(e)(2)(B) (“ACCA”), is unconstitutionally vague. 135 S. Ct. at 2557. The ACCA defines  
11 “violent felony” as any crime punishable by imprisonment for a term exceeding one year, that:  
12 (i) has as an element the use, attempted use, or threatened use of physical force against the  
13 person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise  
14 involves conduct that presents a serious potential risk of physical injury to another. 18 U.S.C. §  
15 924(e)(2)(B). Subsection (ii) above is known as the ACCA’s “residual clause.” Johnson, 135 S.  
16 Ct. at 2555-56. The Supreme Court held that “increasing a defendant’s sentence under the clause  
17 denies due process of law.” *Id.* at 2557.

18 Nguyen was not, however, sentenced pursuant to ACCA. Rather, he was convicted of  
19 violating 18 U.S.C. § 924(c) for carrying and use of a firearm during and in relation to a crime of  
20 violence. Section 924(c)(3) provides:

21 the term “crime of violence” means an offense that is a felony and—

22 (A) has as an element the use, attempted use, or threatened use of  
23 physical force against the person or property of another, or

24 (B) that by its nature, involves a substantial risk that physical force  
25 against the person or property of another may be used in the course  
of committing the offense.

26 As with the ACCA, subsection (A) is referred to as the force or elements clause while subsection  
27 (B) is referenced as the residual clause. Nguyen argues that Johnson is equally applicable to §  
28 924(c) cases and that his instant motion is timely as it was filed within one year of Johnson. The

1 Ninth Circuit, however, subsequently held to the contrary. When Nguyen filed his present  
2 motion, “[t]he Supreme Court [had] not recognized that § 924(c)’s residual clause is void for  
3 vagueness in violation of the Fifth Amendment.” United States v. Blackstone, 903 F.3d 1020,  
4 1028 (9th Cir. 2018). As indicated by the Ninth Circuit, “[t]he Supreme Court may hold in the  
5 future that Johnson extends to sentences imposed ... pursuant to 18 U.S.C. § 924(c), but until  
6 then [defendant’s] motion is untimely.” Id. Accordingly, Nguyen’s motion (#241) was premature  
7 when it was filed.

8 The Supreme Court has, however, subsequently applied the principles first outlined in  
9 Johnson to the residual clause of § 924(c), holding “that § 924(c)(3)(B) is unconstitutionally  
10 vague.” Davis, 139 S. Ct. at 2336. Accordingly, while Nguyen’s motion was premature when it  
11 was filed, the Court will now consider the motion as timely given the Supreme Court’s decision  
12 in Davis, extending the principles of Johnson to § 924(c), and will treat the motion as if filed  
13 seeking relief pursuant to Davis. Further, Defendant received permission from the Court of  
14 Appeals to file this second or successive § 2255 motion (#243).

#### 15 A. Hobbs Act Robbery

16 Nguyen asserts that his conviction is not subject to the provisions of § 924(c)(3) because  
17 the crime (Hobbs Act Robbery) underlying his 924(c) conviction does not constitute a “crime of  
18 violence.” He argues that his § 924(c) conviction and sentence is unconstitutional under Davis  
19 because a Hobbs Act Robbery cannot constitute a crime of violence without relying on the  
20 unconstitutional residual clause. The court disagrees.

21 Nguyen argues that a Hobbs Act Robbery cannot categorically fall under the force or  
22 elements clause of § 924(c)(3)(A) because a Hobbs Act Robbery can be committed by any  
23 amount of force necessary to accomplish the taking, it does not necessarily require the use of  
24 violent force. Prior to the Supreme Court’s holding in Davis, the Ninth Circuit held that Hobbs  
25 Act “[r]obbery indisputably qualifies as a crime of violence” under § 924(c). United States v.  
26 Mendez, 992 F.2d 1488, 1491 (9th Cir. 1993). In 2016, the Ninth Circuit was confronted with  
27 essentially the same argument that Nguyen raises here, that “because Hobbs Act Robbery may  
28 also be accomplished by putting someone in ‘fear of injury,’ 18 U.S.C. § 1951(b), it does not

1 necessarily involve ‘the use, attempted use, or threatened use of physical force,’ 18 U.S.C. §  
2 924(c)(3)(A).” United States v. Howard, 650 Fed App’x. 466, 468 (9th Cir. 2016). The Ninth  
3 Circuit held that Hobbs Act Robbery nonetheless qualified as a crime of violence under the force  
4 clause:

5 [Petitioner’s] arguments are unpersuasive and are foreclosed by  
6 United States v. Selfa, 918 F.2d 749 (9th Cir. 1990). In Selfa, we  
7 held that the analogous federal bank robbery statute, which may be  
8 violated by “force and violence, or by intimidation,” 18 U.S.C. §  
9 2113(a) (emphasis added), qualifies as a crime of violence under  
10 U.S.S.G. § 4B1.2, which uses the nearly identical definition of  
11 “crime of violence” as § 924(c). Selfa, 918 F.2d at 751. We  
12 explained that “intimidation” means willfully “to take, or attempt to  
13 take, in such a way that would put an ordinary, reasonable person in  
14 fear of bodily harm,” which satisfies the requirement of a  
15 “threatened use of physical force” under § 4B1.2. Id. (quoting  
16 United States v. Hopkins, 703 F.2d 1102, 1103 (9th Cir. 1983)).  
17 Because bank robbery by “intimidation”—which is defined as  
18 instilling fear of injury—qualifies as a crime of violence, Hobbs Act  
19 robbery by means of “fear of injury” also qualifies as [a] crime of  
20 violence.

21 Id.

22 The Court holds that a Hobbs Act Robbery constitutes a crime of violence under §  
23 924(c)(3)’s force clause. Under the elements set forth in the language of § 1951, Nguyen’s  
24 underlying felony offense (Hobbs Act Robbery) is a “crime of violence” because the offense has,  
25 “as an element the use, attempted use, or threatened use of physical force against the person or  
26 property of another.” 18 U.S.C. § 924(c)(3)(A); see also United States v. Jay, 705 F. App’x 587  
27 (9th Cir. 2017) (*unpublished*) (finding Hobbs Act Robbery a crime of violence). Davis is  
28 inapplicable here because Nguyen’s conviction and sentence do not rest on the residual clause of  
§ 924(c). The Court sees no reason to depart from the well-reasoned cases of nine other circuit  
courts of appeals that have found Hobbs Act Robbery to be a crime of violence after Johnson.  
See United States v. Garcia-Ortiz, 904 F.3d 102, 106 (1st Cir. 2018); United States v. Hill, 890  
F.3d 51, 60 (2d Cir. 2018); United States v. Mathis, 932 F.3d 242, 265-67 (4th Cir. 2019);  
United States v. Buck, 847 F.3d 267, 274–75 (5th Cir. 2017); United States v. Gooch, 850 F.3d  
285, 292 (6th Cir. 2017); United States v. Fox, 878 F.3d 574, 579 (7th Cir. 2017); United States  
v. Nguyen, 919 F.3d 1064, 1072 (8th Cir. 2019); United States v. Melgar-Cabrera, 892 F.3d

1 1053, 1064-6 (10th Cir. 2018); In re Pollard, 931 F.3d 1318 (11th Cir. 2019).

2 As the Supreme Court found in Stokeling v. United States, 139 S. Ct. 544, 553 (2019),  
3 “Robbery . . . has always been within the category of violent, active crimes” that merit enhanced  
4 penalties under statutes like 924(c). As stated by the Supreme Court “Congress made clear that  
5 the ‘force’ required for common-law robbery would be sufficient to justify an enhanced  
6 sentence.” Id. at 551. Like the statute in Florida, Hobbs Act Robbery is “defined as common-law  
7 robbery.” United States v. Melgar-Cabrera, 892 F.3d 1053, 1064. Section 924(c) includes crimes  
8 that involve “physical force.” 18 U.S.C. § 924(c)(3)(A). Stokeling forecloses Petitioner’s  
9 argument that the “force” required for Hobbs Act Robbery does not meet the standard set by 18  
10 U.S.C. § 924(c)(3)(A).

11 Defendant argues that Hobbs Act Robbery fails to constitute a crime of violence under  
12 the elements clause because it does not categorically require the use of intentional force against  
13 the person or property of another, but instead, can be committed by causing fear of future injury  
14 to property, tangible or intangible. However, “[a] defendant cannot put a reasonable person in  
15 fear” of injury to their person or property without “threatening to use force.” United States v.  
16 Gutierrez, 876 F.3d 1254, 1257 (9th Cir. 2017). “[Robbery] by intimidation thus requires at least  
17 an implicit threat to use the type of violent physical force necessary” to satisfy the requirements  
18 of the elements clause. Id.; see also Estell v. United States, 924 F.3d 1291, 1293 (8th Cir. 2019)  
19 (bank robbery by intimidation requires threatened use of force causing bodily harm). Like the  
20 court in Mathis, this Court sees no reason to discern any basis in the text of elements clause for  
21 creating a distinction between threats of injury to tangible and intangible property for the  
22 purposes of defining a crime of violence. 932 F.3d at 266. Therefore, Hobbs Act Robbery  
23 constitutes a crime of violence under the elements clause of Section 924(c).

### 24 III. Certificate of Appealability

25 To appeal this order, Nguyen must receive a certificate of appealability. 28 U.S.C. §  
26 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22–1 (a). To obtain that certificate, he “must  
27 make a substantial showing of the denial of a constitutional right, a demonstration that ...  
28 includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the

1 petition should have been resolved in a different manner or that the issues presented were  
2 adequate to deserve encouragement to proceed further.” Slack v. McDaniel, 529 U.S. 473, 483-  
3 84 (2000) (quotation omitted). This standard is “lenient.” Hayward v. Marshall, 603 F.3d 546,  
4 553 (9th Cir. 2010) (en banc). Given the cold-blooded murder of the security guard in this case,  
5 whose back was turned as he washed windows, the Court cannot find that other reasonable jurists  
6 would find it debatable that the Court's determination that Hobbs Act Robbery is a crime of  
7 violence pursuant to the force clause of § 924(c) is wrong. Accordingly, the court denies  
8 Defendant a certificate of appealability.


9 IV. Conclusion

10 Accordingly, IT IS HEREBY ORDERED that Petitioner Vu Nguyen’s Motion to Vacate,  
11 Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (#244/257) is **DENIED**;

12 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for  
13 Respondent and against Petitioner in the corresponding civil action, 2:17-cv-0740-KJD, and  
14 close that case,

15 IT IS FURTHER ORDERED that Petitioner is **DENIED** a Certificate of Appealability.

16 DATED this 31st day of March 2020.

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19 Kent J. Dawson  
20 United States District Judge  
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